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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1920

ALABAMA AND VICKSBURG RAILWAY COMPANY, ET AL.,

versus

SMITH JOURNEY.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI.

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BRIEF OPPOSING PETITION FOR CERTIORARI.

The question presented by this record is as to whether or not Orders 18 and 18a are involved in a decision of this case, and if it be held that they are, then as to the power of the Director General of Railroads to issue Orders No. 18 and 18a.

Section 10 of the Act of Congress known as the Federal Control Act, approved March 21st, 1918, is in part as follows, viz:

> "Section 10. That carriers while under Federal control shall be subject to all laws and liabilities as common carriers, whether arising under State or Federal laws, or at common law, except in so far as may be inconsistent with the provisions of this Act

or any other Act applicable to such Federal control, or with any order of the President. Actions at law and in equity shall be brought by and against such carriers and judgments rendered as now provided by law, etc."

After the passage of the above Act the Director General of Railroads on April 9th, 1918, promulgated Order No. 18. Without copying the order in full, we give the main part of it, which is as follows, viz:

> "Ordered that all suits against carriers while under Federal control must be brought in the county or district where the plaintiff resides, or in the county or district where the cause of action arose."

This was followed by Order No. 18a, which provided:

> "That all suits against carriers while under Federal control must be brought in the county or district where the plaintiff resided at the time of the accrual of the cause of action, or in the county or district where the cause of action arose."

This last order was issued on April 18th, 1918.

In October, 1917, Smith Journey was injured by the negligent act of the Alabama & Vicksburg Railroad Company. It is seen that *the injury was sustained and the cause of action accrued before the proclamation of the President taking over the roads on December 31, 1917, and before the Federal Control Act of March 21st, 1918*, and the suit is against the corporation and the liability is that of the corporation, and if this judgment is paid it will be paid out of the private funds of the corporation and not out of any funds earned or because of any liability incurred during the period of Federal control. The

Director General of Railroads is not a party to this suit and could not have been made a party. *The suit was instituted in the county where the cause of action accrued, but in a different circuit court district of the same county.* The suit was instituted against the Alabama & Vicksburg Railroad Company on the 30th day of April, 1918. When the case came on for hearing in September, 1918, counsel representing the Railroad filed a plea in abatement, relying solely on the Orders No. 18 and 18a issued by the Director General as the ground for sustaining the plea in abatement. The record fails to show any application was made to the trial court, or any attempt to show that the trial of this case at that time and place would in any way embarrass the full and free operation of all trains on this road.

Counsel relied solely on Orders 18 and 18a without any other showing of any kind, and so relied on the above orders in a case where the cause of action accrued before Government control, and when the liability was solely that of the corporation. This plea in abatement was overruled, and the Railroad defended by proper pleas, and went to trial on the merits, the case was heard in the trial court on the merits and a judgment rendered in favor of plaintiff. This judgment was appealed to the Supreme Court of the State of Mississippi, and there affirmed. See *Alabama & Vicksburg Railroad Company vs. Smith Journey*, 84 S. R. 706. This completes the history of the case.

We notice in the statement of the facts by counsel for petitioner some very extravagant assertions which we do not think concern the questions of law presented for decision to this Court; assertions that find no basis in any fact that appears in this record. For instance, on

page 7 of their petition they state that: "The objection to the jurisdiction or plea in abatement was not a mere technical objection, it was made in good faith because of the inconvenience and detriment to the service resultant from having to transport witnesses to a point off the line of railroad, and also because the jurisdiction selected by plaintiff was notoriously hostile to interstate carriers."

Now there is not a syllable in the record even hinting that the place where this suit was brought was "notoriously hostile to interstate carriers." If this statement is correct, the Mississippi law provided ample remedy for a change of venue without resorting to Orders 18 and 18a. See Section 712, Mississippi Code of 7906. If any inconvenience or detriment resulted to the service by having to transport witnesses to the place of trial, which was in the same county, such fact was not brought to the attention of the court in any manner. We have ample provision in the statutes of the State for the continuance of cases on any good showing made therefor. See Section 784, Mississippi Code of 1906. We would not notice these assertions of counsel as it is our conception that they are unfounded and wholly irrelevant, but if made they are made with some purpose, and we reply only to show that the record does not sustain the assertion, but if it did ample remedy was offered by the statutes of the State to correct it, but that counsel for petitioner did not invoke the statutes or seek any relief thereunder.

Counsel for petitioner further go into a lengthy statement of facts purporting to give the merits of this controversy. The question of liability is wholly one to be determined by the State Court, and both the trial court

and the Supreme Court of the State have passed upon this liability and sustained it. This Court will presume that the judgment of the State Courts on all questions of fact and legal liability under the state law is correct. We shall make no further answer to counsel for petitioner on the facts, but confine our argument to the sole questions we think involved in the case.

The Supreme Court of the State of Mississippi in the case of *Alabama & Vicksburg Railroad Company vs. Journey*, 84 S. R., page 706, says in its opinion in the outset that: "That we do not think that the Court erred in the trial of the case upon its merits."

This case, we think, turns upon the following questions, viz:

First: Can Order 18 and 18a be made to apply to a cause of action against a carrier, when the cause of action is against the corporation itself, and accrued before Government control?

Second: Did the Director General have power, under the Federal Control Act, to make Orders 18 and 18a?

Third: Where petitioners plead to the merits after the demurrer to this plea in abatement was sustained, did not this waive any right they had to further object to the venue, or trial in the district in question?

We will discuss the above questions in the order stated.

FIRST: CAN ORDER 18 AND 18A BE APPLIED TO A CAUSE OF ACTION AGAINST A CARRIER, WHEN THE CAUSE OF ACTION IS AGAINST THE CORPORATION ITSELF, AND ACCRUED BEFORE GOVERNMENT CONTROL?

If Orders 18 and 18a cannot be applied to causes of action accruing before Government control, then, of course, the validity of the orders are not drawn in question by this suit.

In the case of *Benjamin Moore vs. Atchison T. & S. F. Ry. Co.*, 174 N. Y. Sup. 60, the Court said:

> "The President and his agents had, therefore, no power to make any order whereby a right of action already existing would be extinguished or cut off. If such be the effect of General Order No. 18 as amended, then I must hold that it was, to that extent, an order beyond the power of the Director General, or the agent of the President to make. Furthermore, a reading of the paragraph above quoted leads to the conclusion that Congress did not intend to authorize the President or his agents to make orders affecting the jurisdiction of the state courts, or affecting the right to maintain actions therein, since it is expressly provided, without qualification of any kind, that actions at law and suits in equity may be brought against carriers, and judgments rendered 'as now provided by law'. The order of the President mentioned in the first sentence of the paragraph seems to be those affecting liability. If the delegation of power to the executive branch of the Government be valid, a question which I do not decide, the President or Director General may make orders affecting liabilities to arise in future. But, once a liability arise, it may, by express command of the statute, be prosecuted in the same manner as it could have been had the statute not been enacted."

In the case of *West vs. New York, N. H. & H. R. R. Co.*, 123 N. E. 621, the Massachusetts court had on review Orders No. 18 and 18a. The plaintiff in the above suit brought suit for a breach of contract. The cause of action accrued on July 14th, 1917. We understand from the facts stated in the above case that the suit was instituted in violation of Orders 18 and 18a. The court says in its opinion on page 622: "It becomes necessary to decide whether the order of the Director General deprived the Court then sitting for Suffolk County of jurisdiction." The Court then proceeds at length to discuss the various statutes and proclamations, and concludes its discussion with this statement (See page 624), viz:

> "The last paragraph of this order was amended by a general order dated April 18th, 1918, designated as 18a which previously has been quoted. It is to be noticed that the order as amended is based on the Act of Congress of March 21st, 1918, but the authority of the Director General to act rests on his appointment by the President. It is manifest, although no attachment or levy can be made, that neither of the resolutions, the proclamation thereunder, nor the subsequent statute prohibits action for damages in accordance with the civil procedure prescribed by the states. The order of the Director General having been issued after the plaintiff's action had been begun is therefore inapplicable and the plaintiff could resort to any court of competent jurisdiction for redress although no attachment on mesne process could be made, and if he obtained judgment no execution could be levied on the defendant's property. It follows that this cause of action being transitory and not local the plaintiff can

bring suit in this county where the defendant has a usual place of business and under the terms of the report the defendant is to answer over."

We might argue in this case that the objection raised by the plea in abatement is more technical than substantial as the case is brought in the same county, and the fact that defendant is sued in the district in question is proof of the fact that defendant was localized in the district and had a usual place of business therein, but our conception of the case is that these things are beyond the real question that this Court is called upon to decide. Our idea is that only three questions are involved. Is this order valid? If so, does it apply to causes of action accruing before it was made? Does the fact that defendants pleaded to the merits after a demurrer was sustained to the plea in abatement waive the right to now insist upon it? All these questions are purely questions of law.

If the Director General can validly promulgate Orders No. 18 and 18a he can upset the jurisdiction of every court in the State. He could appoint one place in the State for the hearing of all cases against a carrier. He could designate the District of Columbia as the only place where a cause could be tried. If the Director General had the power to make this order at all, the power is unlimited and extends as far as in his judgment the interest of the public might demand. There were limitations upon the power of the Director General to promulgate orders destroying existing rights and nullifying the jurisdictions of State courts.

The Act of March 21, 1918, says: "Actions at law or suits in equity may be brought by and against such carriers and judgments rendered as now provided by law."

The above Act clearly retained the rights of all litigants to continue to bring suits "as now provided by

law", not "as may hereafter be fixed by the Director General." The Act kept alive all rights under the law existing at the date of the passage of the Act to the same extent as if the Act had never been passed. The Director General was not a party to this litigation; the Government was not affected by it; the railroad corporation will pay the judgment if it is finally decided against it, and the cause of action arose before Government control.

The cases discussing this question are necessarily few, but such cases as we have found sustain the contention that Orders No. 18 and 18a do not affect causes of action arising before Federal control, and suits wherein the Director General cannot be affected in any way as the Federal Government is not to be called upon to pay anything.

In the case of *McGregor vs. Great Northern Ry. Co.*, 172 N. W., it is held that General Order No. 50 is void as involving an unwarranted deprivation of the plaintiffs alleged cause of action, and as being in conflict with the Acts of Congress passed to meet war emergencies. In the above case it appears that the plaintiffs cause of action accrued in January, 1918, prior to the passage of the Act of March 21, 1918, and the court held that the cause of action had vested in the plaintiff prior to the passage of the Railroad Control Act of March 21, 1918, and was not affected by it. The above case discusses the Railroad Control Act at length, and further holds that the carrier corporations, during the period of Federal control, remained legal entities capable of suing and being sued.

The Court further said on page 843:

"At the time of the injury upon which this action is predicated, control had been assumed by the President under an Act which did not purport to limit in any degree the rights of the public in their relations with the carriers, except to the extent necessary to permit the full use of the transportation facilities. The statute was very brief, and apparently was designed to authorize control for military purposes and related to emergencies. Under the President's proclamation of December 31, 1917, it was expressly provided that 'Suits may be brought by and against said carriers and judgments rendered as hitherto until and except as far as said Director may, by general or special orders otherwise determine.' Such was the status of Federal control at the time the alleged cause of action arose, and it was the same at the time of the passage of the Act of March 21, 1918."

The Court then proceeds to hold that General Order No. 50 is a nullity, and that the Act of March 21, 1918, has no application to a cause of action accruing on January 22, 1918.

In the case on trial the cause of action accrued in October, 1917, before the proclamation of the President of December 31, 1917, and before Federal control had been assumed in any manner or form.

In the case of *Angle vs. Chicago, St. Paul & Milwaukee Ry. Co.*, 38 Law Ed. U. S. Reports 55, it is held that a right of action to recover damages for injury is a vested right and beyond the power of legislative action to destroy. When this right of action was vested in Journey he had the right to institute this suit where it was instituted and when the Act of March 21, 1918, was enacted

it preserved all rights against carriers that existed "as now provided by law", and the Director General was not authorized to change that declaration of Congress by the issuance of Orders 18 and 18a. If they could relate back and destroy that vested right to bring this action "as now provided by law", the effect is to permit the Director General to repeal and nullify that part of the Act of March 21, 1918.

In the case of *Wenfree vs. Northern Pacific Ry. Co.*, 57 Law Ed. U. S. 518, the Court held that a retroactive effect will not be given to the Federal Employees Libbility Act of April 22, 1908, so as to make its provisions applicable to a cause of action which accrued before its passage.

In the case of *Ettor vs. City of Tacoma*, 57 Law Ed. U. S. 773, the Court held that the right of abutting owners to consequential damage arising from an original street grading under municipal direction given by the Washington law was a vested property right and could not be defeated by a repeal of the laws. It is a universal rule that laws are prospective in their operation unless it clearly appears that the legislature intended them to have a retroactive effect. Such cannot be said of the Act of March 21, 1918. We earnestly contend that no Federal question is involved in this case because the Orders of the Director General were not involved, because they were not applicable to a cause of action arising before Federal control.

SECOND: ORDERS 18 AND 18A ARE INVALID BECAUSE IN CONFLICT WITH SECTION 10 OF THE ACT OF MARCH 21ST, 1918.

The Act provides that "actions at law or suits in equity may be brought by and against such carriers and judgments rendered as now provided by law."

Actions may be brought *as* now provided by law, so says the statute. When it was passed the law provided that this action could be brought where it was commenced, but the orders complained of in effect say that you shall not bring "actions as now provided by law" as the statute says, but you must bring such actions "as I shall now provide by Orders 18 and 18a."

To state the case seems to conclusively show that the Orders are violative of the statute and a nullity, and many courts so hold. In fact nearly all Courts of last resort deciding this question have held invalid Orders 18 and 18a. The Supreme Court of the State of Mississippi in the Journey case, the one we now consider, said the following:

> "If Order No. 18, issued by the Director General of Railroads, is a valid exercise of power vested in him, the plea in abatement of this action is good. The order manifestly was intended to, and does, limit the right to maintain the action at this time to the district where the injury occurs, or the district of plaintiff's residence, where there are more than one district with the jurisdiction of the particular court, limiting the venue to the place of jurisdiction of the injury, or the jurisdiction of plaintiff's residence.
>
> "The first clause of Section 10 of the Act of Congress of March 21, 1918, granting Federal control of railroads, relates to liability, and the words therein, 'or with any order of the President', refers to

orders governing rates, fares, classification, operation, and the general management of railroads, and their business, and are powers that may be and are delegated to the President of the Federal Control Act, and for damages arising by reason of a compliance with such orders no right of action can be maintained.

"The second clause of Section 10 of this Act provides: 'Actions at law or suits in equity may be brought by and against such carriers and judgment rendered as now provided by law.' The Act, clearly providing by said clause that actions at law may be brought against carriers as now provided by law, was intended to, and does, leave the venue of suits and the jurisdiction of courts as they were at the time of the passage of the Act.

"Order No. 18 undertakes to modify and limit the scope of this jurisdictional provision of Congress, and is the exercise of a power that is not, and that probably could not be, delegated by Congress. Article 1, Paragraph 1, Const. U. S. *Where there is a showing that the trial would seriously interfere with the operation of the road, or in any wise interrupt the operation of trains engaged in hauling war material, troops, munitions, or supplies, or in any way prejudice the Government in the prosecution of the war, no right-thinking Court would hesitate to grant a continuance during the period of such condition.*

"Section 10 of the Act of Congress (U. S. Comp. St. 1918, U. S. Comp. St. Supp. 1919, Sec. 3115 3-4j) contains all the law pertinent to this case, and we copy same, viz:

"'Section 10. That carriers while under Federal control shall be subject to all laws and liabilities as common carriers, whether arising under State or Federal laws or at common law, except in so far as may be inconsistent with the provisions of this Act or any other Act applicable to such Federal control or with any Order of the President. Actions at law or suits in equity may be brought by and against such carriers and judgments rendered as now provided by law; and in any action at law or suit in equity against the carrier, no defense shall be made thereto upon the ground that the carrier is an instrumentality or agency of the Federal Government.'

"It seems clear to us that Congress did not delegate to the executive the power claimed by appellant, but in apt language left the law as it was before the passage of the statute." *Alabama & Vicksburg Ry. Co. vs. Journey*, 84 S. R. 706.

In discussing the effect of that part of Section 10 under discussion here, the Circuit Court of Appeals in the case of *Postal Teleg. & Cable Co. vs. Call*, 255 Fed. 851, said:

"Its effect is to limit the interference of Government control in the question of suits against carriers, whether at law or in equity, to the enforcement of the judgment or decree and not to interfere with the right of the plaintiff to obtain a judgment or decree against the carriers. It permits actions at law or in equity to be brought against carriers, and judgments to be rendered as now provided by law, and prohibits the carrier from defending upon the

> ground that it is an instrumentality or agency of the Federal Government. It provides, however, that the judgment or decree, when obtained, shall not be enforced, as against the property in Federal control, by process, mesne or final."

The Court declares in the above case that the effect of the Act is to limit the interference to the enforcement of the judgment, and leave other rights of the litigant untrammelled.

In the case of *Haubert vs. Baltimore & Ohio Ry. Co.*, 259 Federal 361, the Court in discussing Section 10 states:

> "The first sentence of this Section relates to liabilities, and the second to the manner in which they may be enforced. The second sentence of this Section permits actions at law or suits in equity to be brought and judgments rendered as now provided by law."

Our understanding of the above decision, and in fact our contention as to the interpretation of Section 10, that carriers under Federal control are subject to all laws and liabilities under both State and Federal law, not inconsistent with the Act, or any Order of the President. That the Order of the President may, in some instances, determine liability, but when any action is instituted to determine liability in any Court, that action may be instituted in any Court of competent jurisdiction "as now provided by law", and neither the President nor any agent is given authority to prohibit any person from bringing his action in any Court of competent jurisdiction.

In the case of *Louisville & Nashville R. R. Co. vs. Steele*, 202 S. W. 878, in discussing Section 10, the Court of Appeals of Kentucky said:

> "Obviously the effect of the foregoing provisions of the statute is to entirely suspend the right of issuing and levying executions, attachments, or other like process against the property of common carriers under Federal control during the continuance of such control; but it does not prevent a litigant from bringing his action against the latter in any Court of competent jurisdiction, or such court from granting him such relief in the form of a judgment or otherwise, short of the coercive payment or satisfaction of such judgment by the levy of an execution or other like process upon or against any property of the carrier, as the litigant might, but for the passage of the Act, under the laws of the State of his residence, have been entitled to."

The construction placed upon this Act is that the right to sue in any Court of competent jurisdiction under the laws of the State, where a suit is brought, is secured by this Act and no Order of any kind can take it away.

In the case of *Moore vs. A. T. & S. F. Ry. Co.*, 174 N. Y. Supplement 63, the Court declared Orders 18 and 18a invalid if it extinguished or cut off a cause of action already existing, and further said:

> "Once a liability arises, it may, by express command of the statute, be prosecuted in the same manner as it could have been had the statute not been enacted."

In the case of *El Paso & S. W. Ry. Co. vs. Lovick*, 218 S. W. 489, the Supreme Court of Texas in discussing Orders 18 and 18a said:

"On the date of the enactment of the Act of Congress, the law authorized the institution and maintenance of this suit in the District Court of El Paso County, Texas. Under these circumstances Congress expressly authorized the commencement and prosecution of this suit in that Court when it was enacted that actions at law, etc., may be brought, etc., against such carriers and judgments rendered as now provided by law. To avoid any substantial interference, as the result of the above clause, with the complete possession and control of the railroads of the United States, for which the Act provided, the Congress added 'But no process, mesne or final, shall be levied against any property under such Federal control' ", and the Court further said, "In so far as the terms of the General Orders No. 18 and 18a undertook to restrict the right granted by Congress to maintain a suit in any Court of competent jurisdiction, they cannot be upheld."

To the same effect is the case of *El Paso & S. W. Ry. Co. vs. Havens*, 216 S. W. 444.

In the case of *LaSalle vs. Northern Pacific Railroad Co.*, 172 N. W. 918, an attempt was made to enforce Order No. 50 of the Director General, which Order provided that in all suits against carriers, the suits should be instituted against the Director General and not the carrier. In reply to this contention the Court said:

"The Act of Congress of March 21, 1918, providing for the operation of transportation systems during Federal control, provides that actions at law may be brought against carriers and judgment rendered as now provided by law. Order No. 50 issued

by the Director General of Railroads October 28, 1918, required that actions for death or injury to person growing out of the possession, control or operation of any railroad by the Director General shall be brought against the Director General and not otherwise. In so far as such order prohibits the maintenance of such an action against the railroad company it is in conflict with the Act of Congress of March 21, 1918."

The Court further said:

"It seems clear that if the Act of Congress and an Order of the Director General are in conflict, the Act of Congress must prevail."

The same thing is decided in the case of *Franke vs. Chicago & N. W. Ry. Co.*, 173 N. W. 701. All these decisions are based upon the idea that when Congress gave the right to maintain actions at law, etc., "as now provided by law", that it meant what it said, and that suits that could have been maintained in jurisdictions existing at the time of the passage of the Act of March 21, 1918, could be maintained afterwards just as if the Act had never been passed. This is true of Order No. 50 and is equally true of Orders No. 18 and 18a.

In the case of *Johnson vs. McAdoo*, 257 Federal 757, the District Court held that under the Act of March 21, 1918, litigants could sue railroad companies under Federal direction just as they had been previously able to do and in such courts as had jurisdiction under the general law.

To the same effect is the case of *Jensen vs. Lehigh Valley Ry. Co.*, 255 Fed. 795.

In the case of *El Paso Ry. Co. vs. Lovick*, 210 S. W. 283, the Appellate Court of Texas declares Orders 18 and 18a invalid as being in violation of the Act of March 21, 1918.

In the case of *Frierson vs. Chicago R. I. & Pacific*, 254 Fed. 875, the Court declares Orders 18 and 18a invalid.

Turning our attention for a moment to the cases cited by counsel for petitioner, we desire to say that the case of *Rhodes vs. Tatum* cited in 206 S. W. 114 was decided by the Civil Court of Appeals of Texas, and afterwards overruled by the Supreme Court of Texas in the case of *El Paso Ry. Co. vs. Lovick*, 218 S. W. 489. Counsel for petitioner rely almost solely on the case of *Wainwright vs. Pa. R. R. Co.*, 253 Fed. 459. In fact nearly the whole of their brief is devoted to copying the very elaborate opinion of Judge Trieber. But we have shown that nearly every other Court has held the other way, and it seems to us that the decisions declaring invalid Orders 18 and 18a find a more logical predicate in the statute than does the decision of Judge Trieber.

Counsel next cite the case of *Harnick vs. Pa. Ry. Co.*, 254 Fed. 748. This decision was construing a different Order, and we do not concede the principle is the same. We contend that Orders 18 and 18a are invalid and in direct conflict with the Act of March 21, 1918, and should be so declared.

THIRD: PLEADING TO MERITS AFTER OVERRULING DEMURRER IS A WAIVER.

Our further contention is that when defendants plead to the merits and went to trial after the demurrer to the plea in abatement was sustained, they waived the right

to insist upon this objection. They must stand or fall upon this plea, and when the demurrer was sustained they should have permitted judgment to be taken, final, and appealed to the Supreme Court of the State. Under Section 33, Code of 1906, an appeal is allowed from any final judgment of the Circuit Court. Defendants cannot experiment with a plea, and when their experiment is disallowed, plead to the merits and have a trial on same, and after losing out on the merits, then insist that the case should be reversed because the Court erred in denying the plea in abatement. No order of the Court required them to plead to the merits; no statute of the State required this. It was their voluntary act. They could let judgment final be rendered and appeal, but they did not do this.

In 1 Corpus Juris, page 273, the rule is thus stated:

> "In some jurisdictions it is held that when a plea or other objection in abatement is overruled, defendant must stand by it if he would take advantage of the objection, and he waives it if he pleads in bar or otherwise appears to the merits. In other jurisdictions, however, this rule is not recognized, but defendant may have his exception to the ruling and plead over to the merits without waiver of objection."

This question is to be determined by the law of the State the practice of which is under review. In the State of Mississippi when this case was tried it is the law that one must stand or fall on the plea in abatement if advantage is to be taken of it on appeal, and where the plea is objected to in the trial Court and the objection sustained, a plea and trial on the merits is a waiver of any further right to object.

The case of *Memphis & Charleston R. R. Co. vs. Glover*, 78 Miss. 467, directly decides this as we understand the case.

In the Glover case just cited, Glover and others sued the railroad company for a violation of a Mississippi statute. The suit was against Chas. M. McGee and Henry Fink at the date of suit operating the railroad as receivers. The receivers demurred to the declaration, but the demurrer was overruled. Before any other steps were taken the railroad was sold. The original defendants pleaded their discharge, and the plea was adjudged valid. The plaintiffs then sought by appropriate pleadings to revive the suit against the railroad. The railroad appeared and moved to quash the proceedings on the ground that it was unauthorized by law. This motion was overruled and the railroad plead to the merits and a trial was had on same, resulting in a judgment against the railroad which prosecuted an appeal to the Supreme Court and undertook to avail itself of the matters it had sought to set up in abatement, and the Supreme Court of this State said in 78 Miss. 476:

> "But it is insisted that if the appellant be liable this suit cannot be revived against it by scire facias, and that Sec. 669 of the Code of 1892 does not authorize such revival, it being insisted that a receiver is not a person within the meaning of the Section similar to a public officer, trustee or commissioner. We do not think it material to consider, in the attitude of the pleadings in this case, whether technically or literally, the revival was proper under said Section 669, for the reason that after the appellant's motion to quash the scire facias was overruled it did not stand on the proposition that no such revival

could be had, allow judgment to be taken in the court below, and appeal to this Court, presenting that ground, but pleaded generally to its merits, both by its answer and by the plea of the general issue subsequently filed, and thus entered its appearance. This course was a complete waiver of any right to insist upon an improper revival by scire facias." * * * * "Whatever may be the true construction of Section 669 as to whether the appellant is the successor, so as to authorize a revival by scire facias, we think, for the reason above given, the appellant appeared to the merits, and was thus for all purposes in Court."

While it is true that the rule in the Federal Courts seems to be different from what we understand to be the rule in this State, as shown by the case of *Harkness vs. Hyde*, 25 Law Ed. U. S. 237. Also in the matter of *Indiana Trust Co.*, 61 Law Ed. U. S. 1253, *Hitchman Coal Co. vs. Mitchell*, 62 Law Ed. U. S. 260, yet this *only* applies to the Federal practice, and does not apply to States having a different practice as is expressly declared in the case of *Western Life Indemnity Co.*, 59 Law Ed. U. S. 220, in opinion to be found in second column of page 224 where this Court said:

"But the recognition and enforcement of the right on the part of defendants in Federal Courts is a matter quite apart from the authority of the States to establish a different rule of practice within their jurisdictions, as was expressly recognized in *York vs. Texas*, 137 U. S. 17, *Southern Pacific Co. vs. Denton*, 146 U. S. 202, *Mexican C. Ry. Co. vs. Pinckney*, 149 U. S. 194, *McLaughlin Bros. vs. Hallowell*, 228 U. S. 278."

In the case of the *Chicago Life Insurance Co. vs. Cherry*, 61 Law Ed. 966, this Court on page 969 said as follows, viz:

> "A Court that renders judgment against a defendant thereby tacitly asserts, if it does not do so expressly, that it has jurisdiction over the defendant. But it must be taken to be established that a Court cannot conclude all persons interested by its mere assertion of its own power (*Thompson vs. Whitman*, 18 Wall. 457, 87 L. Ed. 897), even where its power depends upon a fact and it finds the fact (*Tilt vs. Kesley*, 207 U. S. 43, 52 L. Ed. 95, 99, 28 Supt. Ct. Rep. 1). A divorce might be held void for want of jurisdiction although the libellee had appeared in the cause. *Andrews vs. Andrews*, 188 U. S. 14, 16, 17, 38, 47 L. Ed. 366, 367, 372, 23 Sup. Ct. Rep. 237. There is no doubt of the general proposition that, in a suit upon a judgment, the jurisdiction of the Court rendering it over the person of the defendant may be inquired into. *National Exch. Bank vs. Wiley*, 195 U. S. 257, 49 L. Ed. 184, 25 Sup. Ct. Rep. 70; *Haddock vs. Haddock*, 201 U. S. 562, 573, 50 L. Ed. 867, 871, 26 Sup. Ct. Rep. 525, 5 Ann. Cas. 1. But when the power of the Court in all other respects is established, what acts of the defendant shall be deemed a submission to its power is a matter upon which States may differ. If a statute should provide that filing a plea in abatement, or taking the question to a higher Court, should have that effect, it could not be said to deny due process of law. The defendant would be free to rely upon his defense by letting judgment go by default. *York vs. Texas*, 137 U. S. 15, 34 L. Ed. 604, 11 Sup. Ct. Rep. 9; *West-*

ern Life Indemnity Co. vs. Rupp, 235 U. S. 261, 272, 273, 59 L. Ed. 220, 224, 225, 35 Sup. Ct. Rep. 37. If, without a statute, a Court should decide as we have supposed the statute to enact, it would infringe no rights under the Constitution of the United States. That a party that has taken the question of jurisdiction to a higher Court is bound by its decision was held in *Forsyth vs. Hammond*, 166 U. S. 506, 517, 41 L. Ed. 1095, 1099, 17 Sup. Ct. Rep. 665."

The only thing this Court cares to examine is as to whether or not the defendant had a full and fair opportunity to present and have determined its plea in abatement. We have shown that it did, and that it could have relied upon it and prosecuted its appeal from the decision of the Court. As was said in the case of *Chicago Life Insurance Co. vs. Cherry*, 61 Law. Ed. 969: "The defendant would be free to rely upon this defense by letting judgment go by default."

Surely this defendant is not entitled to two trials on the merits. It was entitled to stand on its plea in abatement or abandon it and go to trial on the merits, and it chose the latter.

Surely it will be held to its choice. We contend that this certiorari should be denied because the cause of action arose before Federal control; because defendants have waived their right to insist upon the application of Orders No. 18 and 18a by pleading to the merit; and because the Director General had no power to pass any such order. Respectfully submitted,

Robt. R. Hayes
J. A. Teal
E. Lehman Pollak
Edward Lauterbach

Counsel Opposing Petition.

We certify that a copy of the foregoing brief was served on counsel for petitioner on this 23 day of August, 1920, and they signed an acknowledgment of service.

Robt B Mayo
J H Teal
Blalock & Blalock
Clayton & Clayton

Counsel Opposing Petition.

We acknowledge receipt of copy of foregoing brief on this ..... day of August, 1920.

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Counsel for Petition.

FILED
OCT 20 1921
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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1921.

No. 55.

THE ALABAMA & VICKSBURG RAILWAY COMPANY ET AL., PETITIONERS,

versus

SMITH JOURNEY, DEFENDANT.

ADDENDA TO BRIEF FOR PLAINTIFF IN ERROR AND PETITIONER FOR CERTIORARI TO THE SUPREME COURT OF THE STATE OF MISSISSIPPI.

We respectfully call the court's attention to the following additional authorities on the point here at issue:

In Missouri Pac. R. R. Co. *vs.* Ault, No. 252, October term, 1920 (41 S. C. Reporter, 595) (not yet officially reported), this Court was dealing with a suit brought against a railroad corporation for wages and penalty for non-payment of wages sought to be recovered by an employee who was both hired and discharged during Federal control. The railroad corporation pleaded the act of 1916, the Federal

Control Act, section 10, and General Order No. 50 of the Director General.

The Court, speaking through Mr. Justice Brandeis, had occasion there to review the whole situation and, speaking of section 10 of the Federal Control Act, said, among other things:

Page 595:

> "The provision applies equally to cases where suits against the carrier companies were pending in the courts on December 28, 1917; to cases where the cause of action arose before that date and the suit against the company was filed after it and to cases where both cause of action and suit had arisen or might arise during Federal operation." * * *

Page 596:

> "It is this conception of a transportation system as an entity which dominates section 10 of the act. The systems are regarded much as ships are regarded in admiralty. They are dealt with as active responsible parties answerable for their own wrongs. But since levy or execution upon their property was precluded as inconsistent with the government's needs, the liability of the transportation system was to be enforced by allowing suit to be brought against whomever, as the party operating the same, was legally responsible under existing law, although it be the Government.
>
> "Thus, under section 10, if the cause of action arose prior to Government control, suit might be instituted or continued to judgment against the company as though there had been no taking over by the government, save for immunity of the physical

property from levy *and the power of the President to regulate suits in the public interest as by fixing the venue or the time for trial.*"[1] (Italics by present writer.)

The Court, in a note, citing among others the case of Wainwright *vs.* Penn. R. R., 253 F., 459, which is quoted from at length on page 19 *et seq.*, our brief of April, 1921.

270 Federal 280, *Ellis vs. A., B. & A. Ry. Co. et al.:*

This case was decided by the District Court for the Northern District of Georgia on January 21, 1921, Sibley, District Judge. The court said in part:

"According to the construction given in the *Westbrook case* to section 10, the sentence, 'Actions at law or suits in equity may be brought by and against said carriers, and judgments rendered as now provided by law,' applies to suits against the Director General and makes applicable to them the whole code of procedure formerly applying to railroad companies. This would include the matter of venue and the place where suits should be brought, in the absence of any controlling order by the President. Otherwise, prior to the issuance of such orders, there would be no provision on the subject. Accordingly, until the President, through the Director General, issued Order 18 and 18*a*, the venue of this suit against the Director General would have been in the district

[1] Muir *vs.* Louisville & Nashville R. Co., 247 Fed., 888; Wainwright *vs.* Pennsylvania R. Co., 253 Fed., 459; Di Tommaso *vs.* Railroad Co., 28 Pa. Dist., 473; Bolton *vs.* Hines, 221 S. W. (Ark.), 459; Le Clair *vs.* Montpelier, &c., R. Co., 106 Atl. (Vt.), 587; Benjamin Moore & Co. *vs.* Atchison, T. & S. F. R. Co., 174 N. Y. S., 69; Special Rules of Practice During Federal Control, 59 I. C. C., 797, 798.

of the principal office of the proprietary railroad company. But those orders undertook to locate suits against the Director General in the district either of the plaintiff at the time of the accrual of the cause of action or that in which the cause of action arose. This suit is filed in neither district, plaintiffs being citizens of Texas, and the cause of action arising in a State other than Georgia.

"These orders, while at variance with the implication of the sentence quoted from section 10 of the Control Act, are authorized by the language of section 9 (section 3115 ¾ *i*) and by the preceding sentence in section 10, that—

"'Carriers while under Federal control shall be subject to all laws and liabilities as common carriers, whether arising under State or Federal laws or at common law, except in so far as may be inconsistent with the provisions of this act or any other act applicable to such Federal control or with any order of the President.'

"Though this sentence relates rather to the existence of the liability than to the mode of its enforcement, it clearly authorizes the President to withdraw liability altogether to any extent to which he may find its existence incompatible with the purposes of the government control. The preamble to General Order 18 recites the incompatibility found to exist in answering suits in the old places of venue. If the President could withdraw liability altogether, he might limit it by conditioning the place of its enforcement. As the greater includes the less, this must be involved in the powers given him by Congress.

"And especially in time of war this is not an unconstitutional delegation of legislative power. Selec-

tive Draft Cases, 245 U. S., 366, 389; 38 Supreme Ct., 159; 62 L. Ed., 349; L. R. A. 1918C, 361; Ann. Case 1918B, 856, and cases cited. These orders have been sustained by courts which differ from the construction of section 10 made in the *Westbrook case*, and which have found it necessary to construe the orders as giving the whole foundation for suits against the Director General as a representative of the United States. See *Nash vs. Southern Pac. Ry.* (D. C., 260 Fed., 280; *Blevins vs. Hines, Director General* (D. C.), 264 Fed., 1005, as well as those whose construction approaches more nearly to that of the *Westbrook case*, as *Hines, Director General, vs. Dahn* (C. C. A.), 267 Fed., 105; *Mardis vs. Director General* (C. C. A.), 267 Fed., 171; *Wainwright vs. Penn. R.* (D. C.), 253 Fed., 459; *Johnson vs. McAdoo* (D. C.), 257 Fed., 757; *Hanbert vs. B. & O. R. Co.* (D. C.), 259 Fed., 361; *Rutherford vs. Union Pacific* (D. C.), 254 Fed., 880.

"It will accordingly be adjudged that the suit against the Director General be dismissed without prejudice."

Blevins vs. Hines, 264 Fed., 1005:

This case was decided by the District Court for the Western District of Virginia, on May 8, 1920, by McDowell, District Judge. Paragraph 1 of the head-note, which seems correctly to reflect the decision, reads as follows:

"Under Federal Railway Control Act, paragraph 8 (Comp. St. 1918, Comp. St. Ann. Supp. 1919, par. 3115 3/4*h*), authorizing the President to execute the powers thereby conferred through such agencies as he may determine, the presidential proclamation of January 10, 1919, appointing a Director General of

Railroads, with authority to make all necessary orders, and General Order 50*a* of the Director General, requiring that actions for injuries from negligence of employees shall be brought against the Director General and not otherwise, the provision of section 10 of the act (section 3115 ¾*j*), that action shall be brought against the carrier, is abrogated and the carrier is not a proper party, as this provision was to be effective only if not inconsistent with any order of the President."

Respectfully submitted,

JULES BLANC MONROE,
MONTE M. LEMANN,
R. H. THOMPSON,
Attorneys for Plaintiff in Error.

Office Supreme Court, U. S.
FILED
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No. 2855

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1920

ALABAMA VICKSBURG RAILWAY COMPANY,
ET AL., *Petitioners and Plaintiffs in Error,*

vs.

SMITH JOURNEY, *Defendant in Error.*

REPLY TO BRIEF FOR DEFENDANT IN ERROR OPPOSING THE PETITION FOR CERTIORARI.

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Robert H. Thompson of Jackson, Mississippi,
Attorneys for Petitioners and Plaintiffs in Error.

TUCKER PRINTING HOUSE JACKSON MISS

IN THE SUPREME COURT OF THE UNITED STATES

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vs.

SMITH JOURNEY, *Defendant in Error.*

REPLY TO BRIEF FOR DEFENDANT IN ERROR OPPOSING THE PETITION FOR CERTIORARI.

The able brief of the attorneys opposing the petition for certiorari does violence to the record and to the law of Mississippi, in so far as it contends that the railway company by pleading to the merits waived its plea in abatement, and lost the right to complain of the judgment sustaining a demurrer to said plea.

FIRST. THE CONTENTION VIOLATES THE RECORD.

The Supreme Court of Mississippi did not decide that the plea in abatement was waived or that the right to complain of its having been adjudged insufficient in law was lost by the railway company. On the contrary, that Court held that:

> "If Order No. 18, issued by the Director General of Railroads, is (was) a valid exercise of power vested in him, the plea in abatement of this action is good."

The judgment of the trial court sustaining the demurrer to the plea, setting up the Orders, Nos. 18 and

18A, of the Director General of Railroads, expressly granted the railway company leave to plead further and its order provided that the exception therein noted should be treated as a formal bill of exceptions to the ruling of the Court sustaining the demurrer to the plea. It is unreasonable to think that the Court wittingly allowed an exception to its ruling and at the same time and in the same order authorized the waiver of the exception.

The Supreme Court of Mississippi in its opinion in this case (84 So. Rep. 706) with approval quoted at length from the written opinion of the trial judge wherein he announced:

> "If Order No. 18, issued by the Director General of Railroads, is (was) a valid exercise of power vested in him, the plea in abatement of this action is good."

This finding was affirmed by the Supreme Court of Mississippi, and that too after the defendant railway company had pleaded to the merits, after the trial on its plea to the merits and after every thing had been done upon which opposing counsel now seek to predicate the alleged waiver presented by them in argument. The State Supreme Court decided that Order No. 18 was invalid. It cannot be inferred that the State Supreme Court would have based its decision upon a question, the right to present which had been waived by the party urging it. The State Supreme Court did nothing of the kind, it decided the Federal question presented by this record upon what the Court adjudged to be its merits, without effort to evade it.

SECOND. THE CONTENTION OF OPPOSING COUNSEL VIOLATES THE LAW OF MISSISSIPPI.

In *Kendrick vs. Watkins*, 54 Miss. 495, the Supreme Court of Mississippi decided (1877) that:

> "When a demurrer to a plea in abatement is sustained, the judgment is *respondeat ouster*, and the defendant may then plead to the merits."

This is the unquestioned law of that state. It has not, to our knowledge, been questioned since 1877. There is no reported decision, we have been able to find, affecting in any way the decisions in *Kendrick vs. Watkins, supra,* on the point for which we cite it.

The case of *Memphis & Charleston R. Co. vs. Glover,* 78 Miss. 467, relied upon by opposing counsel, is not in point and in no way affects the authority of *Kendrick vs. Watkins.* In the Glover case the receivers of a railroad while operating the road incurred a statutory liability and were sued by Glover therefor. Pending the suit that part of the railroad within the State of Mississippi was sold under the orders of the Court by which the receivers were appointed and by the terms of the sale the purchaser assumed and promised to pay any and all liabilities incurred by the receivers. After the sale the receivers were discharged, pleaded their discharge to Glover's suit and were dismissed therefrom. Whereupon Glover, the plaintiff in the suit, by *scire facias* sought to revive his action against the purchaser, the Memphis & Charleston Railroad Company. The purchaser appeared to the *scire facias,* the proceeding seeking the revival of the suit, and moved to quash the same. The purchaser did not plead in abatement and there was no demurrer to any pleading in the case. There did not arise in said case any question at all akin to the one sought by opposing counsel to be injected into the case at bar. The purchaser's motion in the Glover case to quash the *scire facias* seeking to revive the suit was overruled, and thereupon he pleaded to the merits. The case was tried on its merits and decided for the plaintiff and the defendant, the purchaser, appealed to the State Supreme Court. The State Supreme Court held that error could not be predicated of the judgment overruling the motion to quash the *scire facias.*

It is apparent, we think, that the motion in the Glover case to quash the *scire facias* largely involved the same questions as were presented by the plea to the merits.

The motion and the plea to the merits both involved the question whether the purchaser was liable to the plaintiff because of his assumption to pay the liabilities incurred by the receivers in their operation of the railroad. If the purchaser assumed the liability pleaded in the declaration his motion to quash the *scire facias* was properly overruled. If he did not so assume his plea to the merits should have been maintained. On the trial under his plea to the merits, he had the right to show that he had not assumed the liability sued upon by the plaintiff, and this of course rendered the disposition of his motion immaterial, and hence, on appeal he could not predicate error of the judgment overruling his motion to quash the *scire facias*.

THIRD. A CONCLUDING OBSERVATION.

There are some parts of the brief to which we are replying which seem by indirection to claim that this suit was instituted in a court having territorial jurisdiction of the place where plaintiff is alleged to have suffered the injury pleaded in his declaration. To such argumentation we reply: The decisions and opinions of the trial court and of the State Supreme Court in this case dispose of all questions touching the fact that this suit was instituted and prosecuted in a court in which it was prohibited to be brought, "If Order No. 18, issued by the Director General of Railroads, is (was) a valid exercise of power vested in him," to quote from the opinions.

Both courts affirmatively announced that fact and both necessarily decided that, if Order No. 18 was valid, this suit was wrongfully instituted in the Court where it was begun and prosecuted to judgment.

Respectfully submitted,

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Monte M. Lemann of New Orleans, Louisiana
Robert H. Thompson of Jackson, Mississippi
Attorneys for Petitioners and Plaintiffs in Error.

The undersigned attorney for Smith Journey, defendant in error, has this day received from Robert H. Thompson, one of the attorneys for the Alabama & Vicksburg Railway Company et al., petitioners and plaintiffs in error———copies of the above and foregoing Reply Brief.

Jackson, Mississippi, September —, 1920.

.....

Attorney for Smith Journey, Defendant in Error.